[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

CHEW HING LUNG & CO., PETITIONERS,
v.
JOHN H. WISE, COLLECTOR OF CUSTOMS for the port of San Francisco. } No. 36.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is concerned with the rate of duty to be assessed under the tariff act of 1890 upon an importation of merchandise in November, 1893, described in the invoice and entry as "sago flour." The entry was classified by the collector as *starch*, dutiable at 2 cents per pound under said act, and liquidated accordingly. The importers, being dissatisfied, duly proceeded by protest under

the act of June 10, 1890, claiming that the merchandise was not dutiable at 2 cents per pound under paragraph 323 of the McKinley Act as claimed by the collector, but was free, either as *tapioca* under paragraph 730, or as *sago flour* under paragraph 695; or else was dutiable at one-fourth of a cent per pound as *rice flour* under paragraph 261, or at 20 per cent ad valorem under section 4 of the act. Whereupon, the Board of General Appraisers, passing variously upon other entries of similar but not the same merchandise (dependent by agreement without separate determination on the present issue), held that the merchandise herein involved was exempt from duty under paragraph 695, and overruled the collector's classification (Rec., p. 10).

The paragraphs in question are as follows:

> 261. Rice, cleaned, two cents per pound; uncleaned rice, one and one-quarter cents per pound; paddy, three-quarters of one cent per pound; rice flour, rice meal, and rice, broken, which will pass through a sieve known commercially as number twelve wire sieve, one-fourth of one cent per pound.
>
> *323. Starch, including all preparations, from whatever substance produced, fit for use as starch, two cents per pound.*
>
> 695. Sago, crude, and sago flour.
>
> *730. Tapioca, cassava or cassady.*
>
> Sec. 4. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem; and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

Upon review in the circuit court the court found the following facts (Rec., pp. 11–12), substantially embodying a stipulation as to the facts agreed upon by the parties:

That the merchandise, although entered by importers under various names, is all the same substance, namely, starch grains derived from the root botanically known as the manihot, known also as cassava or manioc; that of the two prevailing varieties of the root both contain a large proportion of starch, and the starchy substance constituting the importation consists of starch grains obtained from the root by washing, scraping, and grating into a pulp from which the grains settle, and after the juice is decanted a deposit of powder is left, which, being repeatedly washed with cold water and then dried, is nearly pure starch and is insoluble in cold water. This is the substance before the court. That if sufficient heat and motion are afterwards supplied to this substance, a mechanical change takes place by which the grains become fractured and are agglutinated. This further derived substance is partly soluble in cold water and is granulated tapioca, known as pearl and flake tapioca in commerce. That the importations [which at San Francisco are solely by Chinese] were made chiefly for the purpose of supplying Chinese laundrymen, who use it as starch, and to a slight extent for food; but that these uses are limited to the Chinese, except that there is a local use, in some instances, by white laundrymen in San Francisco, for starch purposes, by mixing with wheat or corn starch, which, with potato starch, are the starches

commonly used in the United States. That among the white people dealing with Chinese on the Pacific coast the substance is commonly known as Chinese starch [and it is commercially known in the general importing markets of the United States as tapioca flour, in which markets the term "tapioca" includes the crude forms, flake tapioca, pearl tapioca, and tapioca flour. That at the time of this importation, when the duty of 2 cents a pound was imposed, and since, the cost of the substance has been about the same as that of ordinary starches, and that, previous to the imposition of this duty, when it was admitted free, the cost was less by the amount of the duty than at the time of the importation. That the article is fit for use as starch in the sense that by its use clothes may be starched, but it is not commonly used in laundry work as starch throughout the United States, and is not known to be so used except on the Pacific coast]. That the substance is imported from China and used in Eastern States for starch purposes by calico printers and carpet manufacturers to thicken colors [for bookbinding, in the manufacture of paper, filling in painting, and as an adulterant in the manufacture of candy and other articles] and in manufacture as a substitute for gum arabic and other gums.

The stipulation as to facts was the same as the court's finding, omitting that portion in brackets, except that the stipulation added that the substance is also sometimes used for sizing cotton goods. A stipulation as to evidence (Rec., p. 18) agreed that the merchandise involved is the same as that involved in certain cited decisions and

rulings, and that reference may be made to the same upon the trial or argument as fully as if they formed part of the evidence herein.

Certain testimony was taken before one of the general appraisers acting as referee, and thereupon the circuit court affirmed the decision of the Board of General Appraisers, because of the doubt as to the meaning of the term tapioca and the phrase "preparations fit for use as starch," and in deference to the decision in the case of *in re Townsend*, 56 Fed. Rep., 222 (Rec., pp. 14, 15). Upon appeal by the collector to the circuit court of appeals, under assignment of errors set forth at p. 173 of the record, that court, stating the facts as found by the circuit court, held (Rec., pp. 176–181) that the fitness of root flour included within the term "tapioca," as understood in the trade of the United States for use as starch in laundry work, as well as in the arts and manufactures, is clearly shown by the evidence and findings in the circuit court, and that by the phrase "all preparations from whatsoever substance produced fit for use as starch," Congress intended to add to the protection of American starches and to make all root flour fit for the prescribed use, from whatever root produced and under whatever generic name known, pay duty at the prescribed rate; and that there is nothing to the contrary in the case of in re Townsend, where the Government's case was ended by the failure to make it appear that the article in question was in fact fit for use as starch; and thereupon the appellate court reversed the judgment below and remanded the cause with directions to enter judgment upon the finding in according with the collector's petition for review.

The case now comes to this court upon writ of certiorari granted on the importer's application, the Government not opposing.

THE TESTIMONY.

The Government witnesses (pp. 19–109) were twenty-two in number, and were wholesale grocers, or buyers or managers for wholesale grocers and importers, customs officials, laundrymen, or engaged in other businesses and in professions. It appeared that none of the importers called imported the substance in controversy themselves. The Government witnesses testified in accordance with the agreed-on facts of the stipulation, and upon the disputed issues, that the term "tapioca" embraces commercially no other article than pearl and flake tapioca, and that they did not know any article termed commercially tapioca flour (pp. 20, 22, 24, 25, 31, 36, 44, 46, 70, 72, 85, 101, 108, 112). The testimony was conflicting as to whether market reports of the world in general and those of the United States divided the general heading "tapioca" into "flake, pearl, flour" (pp. 28, 36, 40, 87, 90, 99). Testimony of laundrymen was to the effect that they used the China starch mixed with other starches, and that, because of not being accustomed to the starch, it sometimes did not turn out such good work as ordinary starches. Other and higher priced starches also would not at times turn out good work (pp. 80–82, 93), and one witness testified that a municipal institution of San Francisco bought the starch for the purpose of starching clothes (p. 31). On the question of commercial designation,

one of the Government witnesses (p. 47) testified that if asked for tapioca flour he would give the substance in question, and was thereupon alleged by the importer's counsel to have proved the commercial designation (and see p. 86); but he further testified that, nevertheless, the substance was more a starch than a flour, and that he did not intend to convey the impression that a dealer in tapioca would have to specify further than "pearl" or "flake." The examiner of the port (p. 48) testified that he knew the substance as starch; that it is invoiced as sago flour, formerly as root flour, very seldom as tapioca flour; and the adjuster states that various terms are recklessly used by the Chinese in their invoices, and that the article is "loosely called" (pp. 95, 96; see also importers' testimony, p. 163). The examiner of drugs testified that the article is not by scientific analysis a true flour, lacking gluten, the fibrous matters, the sugar, and some other similar ingredients (p. 52), and that (pp. 56–58) the additional process producing "flake" has changed some of the starch to gum, and therefore powdered "flake" would not be the same as Chinese starch or tapioca flour (see also pp. 60–65, 104, 105). A Government witness (pp. 108–9) testified that the difference between ordinary flour and powdered starch can be told by the sense of touch. The chemist, Price, testified from his practical knowledge, as well as from chemical analysis and microscopic examination, that, excepting one sample marked "rice flour," all samples of the various substances in controversy were starch and not flour, and came within the former designation; and that there is the same relative distinction between flour

and starches from cereals and roots, respectively; and that cassava meal, which is the root merely dried and pulverized, corresponds to flour from wheat, but that either substance further treated produces starch [in the case of cassava, Chinese starch, or the "tapioca flour," so called], the only difference being that the cassava root contains a greater proportion of starch than the wheat (pp. 62, 63). In the same line the witness Frese (p. 98) considers the article in controversy as not tapioca flour [in the general sense], but rather as a product of the same. The Government chemist also testified, from a practical experiment, that the tapioca flour was not useful for edible purposes, and was only fit for starch (pp. 68–9). An importer (p. 97) states that he knows that "tapioca flour" is imported into New York from manifests seen in Singapore," and for the purpose principally of starch substitute for textiles—that is, "for sizing goods."

The importers called nine witnesses, who were importers or their managers or brokers in the import trade, a chemist, and a manager of a laundry machinery factory, The testimony was to the effect that all tapioca is divided into three classifications in foreign prices current, notably those of Singapore, viz, flake, pearl and flour—and that there is no difference as to this commercial classification between the United States and the commercial world (pp. 110, 111, 120, 126, 148, 154, 159, 161); that the largest portion of the importations at ports of the Eastern States is used for sizing by print manufacturers (p. 111); that ordinarily tapioca comes in marked "sago" (which properly is the product of the sago palm, not of the cassava root), though not at San Francisco, where the pack-

ages of tapioca are received with distinguishing marks to segregate the different varieties (p. 112); but this witness said later that his firm did not import or sell tapioca flour to any extent (p. 114). Another witness, who included flour in the term tapioca (p. 120), showed that his statement that he imported it only for food purposes (p. 122) was restricted to pearl and flake tapioca by further testifying (123) that he had never imported a substance known as tapioca flour. A witness, who testified that he knew of no other designation for the article spoken of as tapioca flour, either here or abroad, than tapioca, and to the question whether he had heard or read of any market reports of an article designated as China starch, replied that the only way he could answer the question was by stating that he had never seen a quotation for China starch, also testified that he had never handled the article in any form which he termed tapioca flour, and had never imported it himself, having imported only the pearl and flake tapiocas for culinary purposes (pp. 126–7).

The expert testimony on the importers' behalf (pp. 127–147, 169) shows that from laboratory experiment tapioca starch requires more boiling to fit it for laundry purposes, and probably after the same period of boiling contained more unruptured starch cells than wheat or corn laundry starch, and was somewhat less white, smooth, and free from odor (pp. 132, 133); that flour chemically is anything which is finely enough powdered, and that tapioca in none of its forms contains gluten, nor does potato flour nor flours from several other substances (p. 133); that the article in question is fit for use and is used

for food purposes, but that flake and seed [or pearl] tapioca by heat decomposition has been changed in form and becomes globular and glutinous. On cross-examination it was shown by this witness that many ingredients, such as are contained in flour from cereals and of glutinous origin, and in the dry powdered cassava root, such as gluten, ash, oils, albuminoids, and sugar disappear in the washing process and are not present in the respective starches (pp. 137–140), and the witness then states that he does not know positively that there is no gluten in cassava root (its presence being shown by an expert analysis before the court and the witness), because he himself had never analyzed it (p. 140), and that in the same sense—as far as form and consistency are concerned—he would call the starchy product from wheat a flour (p. 141). This witness knew nothing of the commercial designation of the substance and derived his testimony from mechanical and microscopical examination, which showed that the substance contained no other element than starch; he also testified that the purer starch is the better it is for laundry purposes, and that it is at its greatest value for laundry purposes in the form in question; that there is a difference in globules, but not chemically, between the substance and arrowroot, which is largely used as food for the sick (pp. 141, 142).

An agent for certain laundry machinery, who knew nothing of the substance, inferred and supposed it would not work well on the heated rollers of ironing machines (p. 152). A merchandise broker stated that it was not easy to tell the article from the sample; that it is not known by any other name than tapioca flour, as far as

eastern markets are concerned, but is brought into San Francisco market as China starch (pp. 155, 156); that except experimentally he did not know of any importations other than those by Chinese importers, and that Chinese import the article principally for laundry purposes (pp. 156–7). Several witnesses would call any powdered substance of the tapioca plant tapioca flour (pp. 157, 162).

ARGUMENT.

The argument falls under three heads—commercial designation, use and the statutory language, and the decisions and Treasury rulings.

I.

The question of commercial designation.

This doctrine has in truth no application to the case. The importers did not at all prove the designation as tapioca or tapioca flour; they merely showed that the article is a flour (in the general sense)—that is, a powdered and refined substance made out of the cassava root—and that it is imported in greater or less quantities, and that importations in the Eastern States are used for stiffening and starching purposes. It was, on the other hand, clearly shown that it is not a flour at all, lacking the glutinous and other properties and ingredients which distinguish true flours, and that it is, in fact, both as regards form and properties, a true and substantially pure starch, which the food tapiocas are not, because by mechanical change a portion of the starch properties have been

transformed into gum or dextrin. Some of the witnesses, relying on foreign price lists (in fact, on those of one port, Singapore, from which port alone it appears that all the importations are made), contended for a foreign designation as tapioca flour, and merely alleged the same domestic designation. But even the foreign designation was confined to one point or locality, and was not shown to be uniform, general, and definite, and all such testimony was received under the objection of the Government that a foreign designation is not competent to affect tariff classification. And further, although the importers' witnesses called the article a flour in the general physical sense that it is a powdered substance, it was abundantly shown by them that it is wholly and essentially a true starch; that flours of cereal and albuminous origin contain elements such as gluten, sugar, and albuminoids, which they lose when turned into starch, just as the cassava root does; and that, allowing for the different character and amount of hulls or fibers and other ingredients in cereal or albuminous flours and in dry powdered cassava root, respectively, the latter and not the powdered starch stage thereof is the corresponding flour stage of the cassava; and the starch from wheat, for example, and not wheat flour, is analogous to the so-called tapioca flour.

It must, of course, be conceded that commercial designation does not serve the Government either, although its case is stronger thereon. Such importations as the one in question appear to have been made not only at San Francisco but at the other Pacific coast ports, and

it is to be fairly presumed wherever on the coast the Chinese trade was served that the appellation "China starch" obtained, and that it was not restricted to San Francisco alone; and the true nature of the article as chemically and practically pure starch fortifies the argument as to the Government claim of commercial designation. Nevertheless that designation did not appear to meet the test of generality, uniformity, and definiteness required by the decisions of this court.

II.

Use and the language of the act.

(A) *Chief use.* The intention and effort in tariff acts is to name or characterize dutiable articles of merchandise or those entitled to free entry so accurately that there shall be as few questions of doubtful classification as possible. Consequently, the art of statutory expression, guided by intervening decisions, has been matter of constant evolution, so that especially under the last four tariff acts certain phrases and tests in description have become quite uniform and identical in their meaning. Besides the limitation *eo nomine* and by the common or commercial designation, there are scientific tests, as that of the polariscope, or by specific gravity; tests of substitutionary or imitative character; determinations as to a product or fabric by weight, value, capacity, or percentage of some component part, and among remaining instances there is the specification by the state of crudeness or of preparation or advancement of the article, and by the purpose or method

of importation. One of the most significant tests, and the one perhaps most difficult to settle, is that of use, including purpose and fitness. The general phrases are, "used for," "used as," "used in." The particular phrases are, "used expressly for" or "exclusively for." Exclusive use admits of no doubt. The word "used," without qualification, has been held by the decisions to refer to the customary or usual use and not to the actual use which can not be definitely established, and has been defined to be in effect the greatest single use or predominating use; that is, the use which, in the absence of more definitive language like *exclusive* or *express*, will control. Whereas express use is determined in the recent well-known use cases to mean used particularly or especially, and chief use by those cases is now fixed as the only common, practical, general, and profitable use.

We shall show, we think, that the substance claimed to be dutiable as starch stands the test of the chief-use decisions; but at the outset we desire to emphasize the fact that the phrase, "all preparations, from whatever substance produced, fit for use as starch," is a very broad term; that it not only has no limitation as express or exclusive, but is not properly embraced by the decisions as to chief use, the only requirement being that the substance, whatever its origin and nature, shall be *fit for use* as starch.

Now, it was shown that the article was chiefly used by the Chinese for laundry purposes. Other uses by Chinamen to a limited extent were alleged, but nothing clear or definite on that subject was shown. It was claimed that, being ideally a starch, it was fit for food

use as well as any other starch; but it is well known that the ordinary domestic food starches are not replaced as food by the closely similar laundry starches of the same origin. The only practical experiment on this subject (under the direction of the Government chemist) demonstrated that whatever the purity of the article, and even allowing its ideal fitness for food, practically it could not be used for food purposes. He was very certain that it is not so used. (Rec., p. 68.) Further, it appears that white laundrymen use it in their trade by mixing with corn and wheat starches, and it was furnished to a children's hospital in San Francisco for laundry use, apparently without such mixing. As to the other uses, the bulk of importations in the Eastern States is for sizing print cloths; that is, *stiffening* them. That is a starch use. The bookbinder's use would be the same. The use as a "food adulterant" was for *thickening* soups and by confectioners. The latter use is to give a gummy consistence. The food use merely means that the article is present in certain foods, or similar products which may in a certain sense be regarded as food. Candy, however, is not food, really and in common parlance. It is made of a valuable food component, sugar, but it is not food. There is no true food use, such as pearl and flake tapioca; in soups and candy the use is merely in connection with food, or the food use is secondary and incidental. The same idea runs through all the uses other than laundry use, viz, the starch idea, the stiffening idea. The phrase "use as starch" is equivalent to "use for starching purposes;" that is, the proper force of the term is to be derived from the participle "starching" of the verb "to

starch," expressing a mechanical process and effect, and not from the noun "starch," the name of a substance of various kinds and subject to wide chemical bearings and differentiation, although the variety before the court meets the strictest definition tests as to properties and chemical nature.

Now the verb "to starch" means to stiffen with starch (Webster); the Century Dictionary is the same; to apply starch to, to stiffen or treat with starch (Standard Dictionary); and the latter authority defines the archaic adjective starch as primarily stiff and rigid and derivatively prim or precise.

The starch use has certainly been shown to be the controlling use within the tests of this court as to chief use.

(B) *The language of the act.* This is, "all preparations, from whatever substance produced, fit for use as starch."

Even if it is conceded that the intentionally broad phrase "fit for use" means *practically* fit and not *ideally* fit, the facts sustain its application. The actual starch use in the eastern States is clear. The limited use in white laundries on the Pacific coast appears. The Chinese testimony was for obvious reasons not available. Chinese laundrymen were not in this proceeding interested to show the acceptable character of their work. Those white laundrymen or laundry machinery men who doubted the adaptability of the article for laundry work did so hesitatingly, and their doubt was not based on any knowledge. Some sporadic domestic experiments (to supply evidence) were made in unfamiliarity of the

proper use of this particular starch (pp. 134–135), and besides the witness's faulty recollection of the original condition of the results, the laundried articles were produced long afterwards and were naturally yellowed by time.

But the phrase itself in its broad language, meaning, and intent merits attention. The language is "all preparations, from whatever substance produced, fit for use as starch." When the natural import of this language is considered, and its evident purposes connected with previous legislation and rulings thereon (which will be considered, *infra*) kept in view, it is difficult to understand how this substance or any similar substance can elude its provisions. It does not seem necessary to dwell further upon such a plain proposition.

III.

Decisions and rulings.

These are, in brief, as follows (Rec., p. 18), reviewing them in the light of prior laws: In the evolution of starch and tapioca tariff provisions, which, by the act of 1846 (9 Stat., 47) were both dutiable at 20 per cent (unchanged by the act of 1857, 11 Stat., 192), and by the act of 1861 (12 Stat., 188, 190) were changed by the reduction of the duty on tapioca to 10 per cent ad valorem, we find the provision for tapioca, cassava, or cassady in the act of 1870 (16 Stat., 256), which placed the substance *eo nomine* on the free list, which was continued by the act of 1883 (22 Stat., 521); and the latter act followed the act of 1864 (13 Stat., 266) in differentiating

at varying rates of duty starches made from certain other materials than tapioca. The act of 1883 also provided that arrowroot and root flour should be free (22 Stat., 503, 517, 520).

Now, up to this point in legislation the Treasury rulings were: No. 3161, in 1877, holding that tapioca flour was to be admitted free as one of the three forms of tapioca here alleged; No. 5802, in 1883, proceeded on the same ground and on the additional ground that root flour, being now free under the act of 1883, flour made from cassada root is included. No. 7971, in 1887, followed the preceding decision, and No. 9031, in 1888, followed the two preceding tests as to "root flour, tapioca, * * * though intended for use as starch," although the United States chemist found the substance to be "tapioca starch;" but the importers relied on the then existing free provisions for root flour and did not claim on "tapioca."

While the Department was thus ruling under the prior statutes, the case of *Chung Yune* v. *Kelly* (14 Fed. Rep., 639) was decided, in 1882, Judge Deady holding that "*flour from the cassava root* or 'cassava meal' *from which is made the tapioca of commerce*" was *root flour*, free under the relative paragraph in the act of 1872 (17 Stat., 236), and excluded from the starch paragraph (as it then existed) *eo nomine*. Tapioca was not on the free list of hat act. The McKinley Act changed all this and struck down the argument based on departmental construction, for it not only omitted the paragraph admitting *root flour* free (leaving *ejus generis* only raw or unmanufactured arrowroot to come in free, par. 488), but it changed and

strengthened the starch paragraph materially by adopting the language, "starch and all preparations from whatever substance produced fit for use as starch," so that it can not be claimed by the importers that substances having been known as root flour under previous acts can not now be included in the starch paragraph of the act of 1890 although the free-entry provisions for root flours are dropped in that act, because the language of the starch paragraph in the act was so changed from that of previous provisions as to include clearly what was formerly separately provided for, viz, the flour of the root tapioca or cassava or of any root fit for use as starch.

Upon the adoption of the McKinley Act the Treasury rulings immediately changed in conformity thereto, and decision No. 10277 in October, 1890, held that if the glutinous and albuminous substances have been eliminated from the so-called flour, so that the article is practically starch, it must be so classified. To the same effect are Nos. 10613 and 10954, and G. A. 689. In the latter decision the board discussed the matter at length, and considered that Congress meant, in striking root flour from, and leaving tapioca in, the free list—as root flour embraces all flour from the root, tapioca as well—that tapioca flour was excluded from free entry and pearl and flake tapioca continued free; for, they say, "it is in evidence * * * that the tapioca of commerce is in the form of granules * * * and designed for culinary purposes, while tapioca flour is not fit for culinary purposes, but is fit for starch. It hence seems plain that Congress intended to admit the tapioca of commerce for culinary purposes free of duty, but to impose a duty of 2 cents a pound on

such tapioca flour as is designed for use in the arts." This was followed in G. A. 752, 1041, 1930, and 1969. The only exceptions are G. A. 504 and 2701, in which certain sago flour or sago proved to be a flour was held not to be fit for nor dutiable as starch. Finally, Treasury decision No. 14114 declares that the decision in *In re Townsend* (56 Fed. Rep., 222), which was decided in 1893, is binding upon the Department, and it was in consequence of this decision also that the ruling of the board was changed as rendered in this case. But up to that time the board's decisions on the subject under the act of 1890 were logical and uniform, and were acquiesced in by the importers.

This leads us to the consideration of the Townsend case. The court there found as facts from the evidence—not binding here, for the evidence differs—that the article in controversy was commercially known as tapioca; was not known as starch or as a substitute therefor, had never been sold as starch, was not considered as adapted to the ordinary purposes of starch, was not a preparation actually fit for use as starch, and was cheaper than ordinary starch. All of these facts are disputed, and substantially without contradiction, by the evidence and stipulation as well as the findings of the court in this case, except the finding that tapioca flour is commercially known as tapioca, and upon this latter finding there is an unmistakable preponderance of testimony in our favor that tapioca commercially embraces only pearl and flake tapioca, the edible product. Indeed, we might safely rest our case on this point upon the construction by Judge Deady in the case of *Chung Yune* v. *Kelly*, *ante*, to the effect that tapioca flour is a root flour and is not tapioca, and upon

the uniform decisions of the Board of Appraisers rendered before the Townsend Case was decided, which are more cogent than the ambiguous rulings of the Treasury Department under the earlier acts.

The court is respectfully referred to the report of the Government chemist at the port of New York (Rec., pp. 8, 9), by which it is demonstrated how poorly equipped with evidence the circuit court of appeals was in the Townsend Case for its adjudication upon the substance. The report says: "The court had no commercial evidence before it that the preponderant use of the article was its employment as starch. * * * The court was misled through the insufficiency of testimony." * * * The report differentiates this substance from tapioca, stating that one was starch and prepared for use as such, while the other, the tapioca in the form of flakes, is especially prepared for culinary purposes. Upon the authority of the Townsend case it is only necessary to state the established principle, that a rule of law laid down by the court is only applicable to the particular facts before the court. The reasoning of that case regarding the difference in evidence sustains our contentions here, because the language is: "The decision of the appeal turns upon the question whether under the testimony tapioca flour can be considered as a preparation fit for use as starch." If the case at bar were dependent upon that fact alone, it has been conclusively established in our favor. Again, the court say: "If tapioca flour was * * * a preparation fit for use as starch, the question would have arisen whether it was specially provided for under paragraph 323." * * * Such a question is here pre-

sented, since we have established the fact that the preparation is fit for use as starch, not only upon the evidence, but because of the authorities here cited, which do not seem to have been invoked in the Townsend Case, holding tapioca flour to be a root flour commercially rather than a tapioca.

This leads us again to the main question under another aspect, viz, Is tapioca flour specifically provided for under paragraph 323? There can be no doubt that it is. Taking the narrowest sense of the term of "starch," it is known commercially, at least on the Pacific coast, as starch, and is imported and used for laundry purposes, and there is nothing to show that the Chinese laundry use does not prevail in such laundries over the entire country. It is fit for such use and is commonly so used; and, taking the broader meaning of the term as to which, in addition to the argument herein made, Judge Deady in the Chung Yune Case says that starch "used in the arts as *sizing or stiffening* and not food, is the starch of commerce," this use and fitness as starch have been fully shown by the importers themselves. Further, conceding to the argument that the substance is known commercially to our tariff laws as tapioca flour, the provision for starch is more specific, for under the doctrine of *Magone* v. *Heller* (150 U. S., 70), in which the contest was between the description *eo nomine* sulphate of potash and "substances expressly used for manure," it was held that the agricultural use must prevail over the scientific *or commercial* nomenclature, even where the name of the article appears in the schedule. In such a case the more general clause governs the more special clause, and in a case giving effect to a

specific designation over a general one the qualification is laid down that the instance must be such that the specific language can be applied to nothing else except the article in question. (*Arthur* v. *Stephani*, 96 U. S., 125.) But here, continuing the concession *pro argumento*, the appellation "tapioca" is certainly applied specifically and more commonly to the pearl and flake tapioca used for culinary purposes; and in addition, recurring to *Magone* v. *Heller*, the present case is stronger, for the phrase "fit for use" is as sharply definitive as to plain intent as "expressly used," and tapioca flour is not provided for *eo nomine*, and therefore that portion of tapioca, viz, tapioca flour fit for use as starch, is more specifically differentiated and provided for in the starch paragraph. But we wish to emphasize the fact that the importers have not shown that tapioca flour is commercially known as tapioca. The evidence on that point rests largely on Singapore price lists, and when tested broke down.

Finally, on this point the clear purpose of the starch paragraph of the McKinley Act being to protect American manufacturers, and of the tapioca paragraph and of similar paragraphs to admit free specified forms of food not produced here, the importers must show a food use of tapioca, and they have not done so.

In the Townsend case the court advance an argument based upon relative prices, namely, that if the substance was fit for use as starch, its cheapness over ordinary starch would insure its use as such. This record shows that there have been at all times many fluctuations in the prices of different starches, owing to various causes. It also shows that ordinarily the article is more expensive than the common bulk starch used in trades and manu-

factures (Rec., pp. 37-38) and that, relative to the finer laundry starches, prices at different times have approached each other quite closely (pp. 81–84). The findings of the court say that previous to the act of 1890, when admitted free, the cost was less by the amount of the duty than at the time of the importations, when and since the cost has been substantially as great as that of ordinary starches, a little more than that of the cheapest and a little less than that of the best. As to fluctuations in the prices of tapiocas and domestic starches and their causes, see the record (pp. 38–84).

The corresponding language of the starch paragraph of the Wilson Act is "all preparations from whatever substance produced, *commonly used* as starch," and the language of the Dingley Act is the same as that of the act of 1890, the rate, however, being a half cent less per pound. It is unnecessary to add that neither act should be regarded in determining the question before the court.

In conclusion, we contend that the Government's position is borne out by the language of the act, and conforms to the rules of interpretation and the decisions; it is in accordance with the evident intention and purpose of Congress, as expressed by their language, and fulfills the well-known aim of protection to the American manufacturer, and should, we submit, prevail here.

We therefore respectfully submit that the judgment of the circuit court of appeals in this case should be affirmed, and the substance in controversy be declared dutiable under paragraph 323 of the tariff act of 1890 at the rate of 2 cents a pound.

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